

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 25 2004

In the Matter of

Petition for Forbearance Under 47 U.S.C.
Section 160(c) from Pricing Flexibility Rules
For Fast Packet Services

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WCB Docket No. 04-246

**VERIZON¹ PETITION, IN THE ALTERNATIVE, FOR FORBEARANCE TO
ALLOW IT TO EXERCISE PRICING FLEXIBILITY FOR ADVANCED
SERVICES WHERE THE COMMISSION HAS GRANTED RELIEF FOR
TRADITIONAL SPECIAL ACCESS SERVICES**

Verizon hereby requests, as an alternative to the waiver that Verizon requests in a separate petition being filed simultaneously,² that the Commission forbear under Section 10 of the Act from enforcing Section 69.729 of the Commission's rules and paragraph 173 of the Commission's *Pricing Flexibility Order* ("Paragraph 173"),³ so that Verizon can exercise pricing flexibility for advanced services that rely on packetized technology, including Frame Relay, Asynchronous Transfer Mode ("ATM"), and other packet-switched services other than DSL (the "Advanced Services") in those areas where Verizon has already obtained pricing flexibility for other special access services. As demonstrated below, and in the accompanying Memorandum

¹ The Verizon telephone companies ("Verizon") are the affiliated local telephone companies of Verizon Communications Corp. These companies are listed in Attachment A.

² See *Verizon Petition for Waiver to Allow It to Exercise Pricing Flexibility for Advanced Services Where the Commission Has Granted Relief for Traditional Special Access Services* (filed June 25, 2004) ("Petition for Forbearance").

³ *Access Charge Reform, Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221 (1999) ("Pricing Flexibility Order").

of Points and Authorities, Section 10's forbearance test is clearly met because such pricing flexibility would enhance competition in the advanced services marketplace and thereby benefit both consumers and the public interest.

Background

Pursuant to the terms of the *Bell Atlantic/GTE Merger Order*,⁴ Verizon transferred its Advanced Services from the Verizon telephone companies to a separate affiliate, Verizon Advanced Data Inc. ("VADI"), where they were provided on a deregulated basis. When the Advanced Services were later incorporated into the Verizon tariffs, following reversal of the rationale for the *Bell Atlantic/GTE Merger Order*, the Commission appropriately granted a series of waivers to keep these broadband services out of price cap regulations that apply to traditional narrowband services, pending the Commission's decision in ongoing rulemaking proceedings on the regulatory status of broadband services.⁵ For example, in 2001, the Commission adopted a notice of proposed rulemaking that proposed to treat the local exchange carriers' broadband services, including the fast packet services at issue here, as non-dominant telecommunications services,⁶ and in early 2002, the Commission initiated a rulemaking to alter the asymmetrical regulatory classification of broadband services.⁷

⁴ *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order*, 15 FCC Rcd 14032, Appendix D, ¶ 8 (2000) ("*Bell Atlantic/GTE Merger Order*").

⁵ See attached Memorandum for a more detailed history of Verizon's Advanced Services.

⁶ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Notice of Proposed Rulemaking*, 16 FCC Rcd 22745 (2001) ("*Broadband Proceeding*").

⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking*, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband Classification*").

In light of these pending proceedings, the Wireline Competition Bureau granted Verizon waivers of Section 61.42(g) of the Commission's rules so that Verizon would not be required to incorporate the Advanced Services in price caps in the 2002 and 2003 annual access tariff filings.⁸ The Bureau found that temporary waivers would permit maintenance of the *status quo* pending resolution of the *Broadband Proceeding*. As a result of the waivers preventing the inclusion of these services in the annual access tariff filings, Verizon also was prevented from placing the services within the pricing flexibility portion of the tariff filings according to Paragraph 173 of the *Pricing Flexibility Order*.⁹ However, it would be consistent with those waiver orders' intent of maintaining the *status quo* to permit Verizon to overcome this procedural impediment and exercise pricing flexibility for these services while the *Broadband Proceeding* is pending. To that end, and as shown below and in the attached Memorandum, a grant of forbearance from the price cap rules to permit Verizon to exercise such pricing flexibility would meet the standards set forth in Section 10 of the Act.

**The Commission Must Forbear Under the Standards of Section 10 from Enforcing
Section 69.729 of the Commission's Rules and Paragraph 173 of the Commission's *Pricing
Flexibility Order***

(Continued . . .)
Proceeding").

⁸ See *Verizon Petition for Interim Waiver of Sections 61.42(g), 61.38, and 61.49 of the Commission's Rules*, 18 FCC Rcd 6498 (2003); *Verizon Petition for Interim Waiver of Section 61.42(g) of the Commission's Rules*, 17 FCC Rcd 11010 (2002). The Bureau recently extended the waivers for the 2004 annual access tariff filing. See *Petition for Waiver of the Commission's Price Cap Rules For Services Transferred from VADL to the Verizon Telephone Companies*, WCB/Pricing File No. 04-16, DA 04-1062 (rel. Apr. 21, 2004). Notably, no party opposed Verizon's request to extend the waiver.

⁹ Under Paragraph 173, "[w]henver a price cap LEC can demonstrate in an annual access tariff filing that one of its new services would be properly incorporated in a basket or service band for which it has been granted Phase I or Phase II [pricing flexibility] in any MSA or MSAs, it will be granted the same relief in the same MSAs for that new service."

Under Section 10 of the Act, the Commission must forbear from applying a regulation to a telecommunications carrier or service if the Commission determines that: (1) such enforcement is unnecessary to ensure against unjust, unreasonable or discriminatory charges or practices; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest, including the promotion of competition.¹⁰ Verizon's request for forbearance satisfies each of these three requirements as demonstrated in the attached Memorandum.

Conclusion

For the forgoing reasons, and as an alternative to granting the waiver requested in the separate simultaneous petition, the Commission should grant forbearance and permit Verizon to exercise the same pricing flexibility for the Advanced Services that it has been granted for traditional special access services, pending final resolution of the *Broadband Proceeding*.

Respectfully submitted,

THE VERIZON TELEPHONE COMPANIES

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¹⁰ 47 U.S.C. §10(a)-(b) (2003).

ATTACHMENT A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF VERIZON'S
PETITION FOR WAIVER OF PRICING FLEXIBILITY RULES¹ AND CONTINGENT
PETITION FOR FORBEARANCE²**

The Commission should waive, or if necessary, forbear from, its rules that currently prevent Verizon from exercising the same degree of pricing flexibility for advanced packet switched broadband services such as Frame Relay, ATM and other advanced packet switched services other than DSL (the "Advanced Services") that it already can exercise with respect to traditional special access services in areas where the Commission has previously granted pricing flexibility for those services.

I. SUMMARY

The relief requested here is needed to remedy the unintended consequences of a series of previous waivers granted by the Commission, the intent of which was to avoid subjecting the

¹ See Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services (filed June __, 2004) (seeking waiver of 47 C.F.R. §9.729 (2003) and *Access Charge Reform, Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, ¶173 (1999) ("Pricing Flexibility Order")) ("Petition for Waiver").

² Petition for Forbearance Under 47 U.S.C. § 160(c) from the Pricing Flexibility Rules for Fast Packet Services (filed June 25, 2004) (seeking forbearance from enforcement of 47 C.F.R. §9.729 (2003) and *Access Charge Reform, Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, ¶173 (1999) ("Pricing Flexibility Order")) (*Petition for Forbearance*).

Advanced Services at issue here to the regulations that apply to traditional (or "narrowband") special access services pending the completion of ongoing rulemakings to determine rules for advanced services.³ Specifically, under the terms of the Commission's *Bell Atlantic/GTE Merger Order*, the Advanced Services were previously provided on a deregulated basis through a separate affiliate. When the rationale of that order was overturned, the Commission granted a series of waivers that permitted these services to be provided by Verizon's operating telephone companies without being subject to the price cap rules that apply to traditional special access services. Those waivers quite appropriately were intended to avoid subjecting the Advanced Services to unnecessary regulatory burdens while the Commission completes its rulemaking to determine the rules for broadband services, such as the Advanced Services at issue here.

The unintended consequence, however, is that Verizon is now unable to exercise the same degree of pricing flexibility that the Commission already has granted with respect to traditional special access services. Yet, as explained further below, the Advanced Services at issue here are even more competitive than special access services generally, and it is the major long distance carriers that currently dominate this segment of the marketplace. Accordingly, granting the relief request here would permit Verizon to compete more effectively with the dominant carriers, and better serve the needs of customers and, in turn, the public interest.

II. BACKGROUND

Pursuant to the terms of the *Bell Atlantic/GTE Merger Order*,⁴ Verizon transferred its Advanced Services from the Verizon telephone companies to a separate affiliate, Verizon

³ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Notice of Proposed Rulemaking*, 16 FCC Rcd 22745 (2001) ("Dominant/NonDominant Proceeding").

⁴ *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Applications to Transfer Control of a*

Advanced Data Inc. ("VADI"). The merger order provided that VADI would offer these services on an unregulated basis, like other carriers in the marketplace.⁵ These services were not subject to price cap rules or to any type of rate regulation.

Subsequently, in *Ascent v. FCC*, 235 F.2d 662 (D.C. Cir. 2001), the Court decided that VADI was a "successor or assign" of the Verizon local exchange carriers. This automatically triggered a nine-month period for termination of the separate affiliate requirement for Verizon's Advanced Services.⁶ On September 26, 2001, the Common Carrier Bureau granted Verizon permission to accelerate the period for re-integration of VADI's assets to the Verizon local exchange carriers.⁷ As a result of the *ASCENT* decision, these services were transferred back to Verizon and now are offered under Verizon's Tariff FCC No. 20.⁸

When its Advanced Services were incorporated into the Verizon tariffs, Verizon applied for waivers to keep these services out of the price cap indexes pending the Commission's decision on the regulatory status of broadband services. In 2001, the Commission adopted a notice of proposed rulemaking that proposed to treat the local exchange carriers' broadband services, including the fast packet services at issue here, as non-dominant telecommunications

Submarine Cable Landing License, Memorandum Opinion and Order, 15 FCC Rcd 14032, Appendix D, ¶ 8 (2000) ("*Bell Atlantic/GTE Merger Order*").

⁵ See *id.*, ¶ 271.

⁶ See *Bell Atlantic/GTE Merger Order*, Appendix D, ¶ 11(c).

⁷ See *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License, Order*, 16 FCC Rcd 16915 (2001).

⁸ See, e.g., Verizon Telephone Companies' Tariff FCC No. 20, Transmittal Nos. 123, 142, 281, 341. Subsequent to the transfer, Verizon has included all new advanced services in Tariff FCC No. 20.

services. The Commission reasoned that broadband services are subject to healthy competition and that current regulations may be unnecessary to protect consumers.⁹ The Commission also initiated a rulemaking proceeding to determine the appropriate regulatory classification of broadband services.¹⁰ If the Commission determined in those proceedings that these services are non-dominant or are otherwise not subject to traditional common carrier regulation, the Advanced Services at issue would not be tariffed or included in price caps, or subject to any limitations on pricing flexibility. Verizon explained that it would be unnecessarily burdensome to require Verizon to develop the demand data to incorporate the Advanced Services into price caps and that it would be more prudent to wait until the conclusion of the broadband proceedings, which might obviate the need to include the Advanced Services in the price cap indexes.

In response, the Wireline Competition Bureau granted Verizon a series of waivers of Section 61.42(g) of the Commission's rules so that Verizon would not be required to incorporate the Advanced Services in price caps in the 2002, 2003, or 2004 annual access tariff filings.¹¹ The Bureau found that temporary waivers would permit maintenance of the *status quo* pending resolution of the broadband proceedings and that the waivers would allow Verizon to avoid the burden of incorporating the VADL Advanced Services into the price cap indexes and converting

⁹ *Broadband Proceeding* at ¶5.

¹⁰ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking*, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband Classification Proceeding*").

¹¹ See *Verizon Petition for Interim Waiver of Sections 61.42(g), 61.38, and 61.49 of the Commission's Rules*, 18 FCC Rcd 6498 (2003); *Verizon Petition for Interim Waiver of Section 61.42(g) of the Commission's Rules*, 17 FCC Rcd 11010 (2002). *Petition for Waiver of the Commission's Price Cap Rules For Services Transferred from VADL to the Verizon Telephone Companies*, WCB/Pricing File No. 04-16, DA 04-1062 (rel. Apr. 21, 2004). Notably, no party opposed Verizon's recent request to extend the waiver.

the VADI demand for the price cap calculations. Because these services were exempted from price caps under the waiver, they were not included in pricing flexibility in the annual access tariff filings according to paragraph 173 of the *Pricing Flexibility Order* ("Whenever a price cap LEC can demonstrate in an annual access tariff filing that one of its new services would be properly incorporated in a basket or service band for which it has been granted Phase I or Phase II regulatory relief in any MSA or MSAs, it will be granted the same relief in the same MSAs for that new service.").¹² However, there was nothing in the Bureau's orders that would prohibit them from eventually qualifying for pricing flexibility. Indeed, as noted, the Bureau granted the waiver in part because of the possibility that they would gain even greater pricing flexibility by being totally deregulated as a result of the broadband proceedings.

III. THE COMMISSION HAS ALREADY FOUND THAT SPECIAL ACCESS SERVICES GENERALLY QUALIFY FOR PRICING FLEXIBILITY IN THE AREAS AT ISSUE, AND THAT RELIEF SHOULD ALSO APPLY TO BROADBAND SERVICES

The Advanced Services at issue here consist of services that rely on advanced packet switched technology such as Frame Relay, ATM and other advanced packet switched technologies (other than DSL) and the special access circuits used to deliver them in geographic areas in which the Commission has already granted Verizon Phase I or Phase II pricing flexibility for special access services generally.¹³ In granting pricing flexibility in these areas, the Commission correctly reasoned, as a policy matter, that Verizon's satisfaction of the requisite

¹² See discussion of Commission grant of pricing flexibility to service categories to which Advanced Services belong, *infra*.

¹³ See *Verizon's Petitions for Pricing Flexibility for Special Access and Dedicated Transport Services*, 18 FCC Rcd 11356 (2003), 18 FCC Rcd 6237 (2003), 17 FCC Rcd 5359 (2002), and 16 FCC Rcd 5876 (2001). Pricing flexibility was granted for the last four MSAs as recently as May 12, 2004. See *Verizon Petition For Pricing Flexibility For Special Access And Dedicated Transport Services*, WCB/Pricing 04-01 (May, 12 2004).

competitive showing adequately demonstrated that competition and, in turn, the public interest would be better served if Verizon's services were subject to less rather than more regulatory oversight. For the same reasons, and consistent with that decision and the Commission's pricing flexibility procedures, the Advanced Services clearly qualify for pricing flexibility under the price cap rules.

There is no question that, absent the waivers that the Commission appropriately granted to keep these services out of price cap regulation pending the completion of the broadband proceedings, the Advanced Services at issue here would be within the categories for which Verizon has already obtained pricing flexibility. Indeed, other price cap carriers who were not required to put similar advanced services in separate affiliates include them in their Trunking Basket and Special Access Basket, and therefore are able to exercise pricing flexibility for these services.¹⁴ Now that the Advanced Services were transferred back to the Verizon telephone companies, the only difference between Verizon and the other companies is that Verizon has not incorporated them back into the price cap indexes. In addition, the Bureau's waivers of Section 61.42(g) to keep them out of the price cap indexes expressly were limited to that section and they were not intended to change any of the other price cap rules that apply to Advanced Services, including the pricing flexibility rules.¹⁵

Moreover, in order to obtain pricing flexibility for the geographic areas at issue here, Verizon has already made the competitive showing necessary to obtain relief under the

¹⁴ See, e.g., *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion and Order, 17 FCC Rcd 23725, Appendix A (2002) ("*BellSouth Petition for Pricing Flexibility*").

¹⁵ See, e.g., *Verizon Petition for Interim Waiver of Section 61.42(g) of the Commission's Rules*, Order, 17 FCC Rcd 11010, ¶ 1 (2002) ("we grant Verizon a limited waiver of Section 61.42(g) of the Commission's rules only for purposes of its 2002 Annual Access Tariff Filing, and defer consideration of the full waiver request until a later date.").

Commission's rules for special access services generally. Under these circumstances, it would make little sense to require the Advanced Services at issue here to be incorporated into the price cap rules that apply to traditional narrowband services or to require additional market-by-market competitive showings in order to obtain the same relief for these Advanced Services that already has been granted for traditional special access services. On the contrary, the pricing flexibility regime was intended to enhance competition by allowing price cap LECs regulatory flexibility in markets where competition was sufficiently robust. The current marketplace for advanced services is especially competitive – even more so than with respect to special access services generally. Consequently, imposing the redundant requirement of an additional market-by-market competitive showing in order to obtain relief for the Advanced Services would undermine the intent of the rule by further burdening Verizon as it attempts to compete with the incumbent IXCs that dominate the advanced services marketplace.

IV. IT WOULD SERVE THE PUBLIC INTEREST TO PERMIT VERIZON TO COMPETE MORE EFFECTIVELY BY ALLOWING IT TO EXERCISE PRICING FLEXIBILITY FOR THE ADVANCED SERVICES

Verizon requests immediate pricing flexibility relief so that it can respond to competitive pressures by offering contract arrangements, including contract pricing, that are responsive to customer demand for these services. Such relief would enhance competition in the advanced services marketplace, furthering the underlying goals of the pricing flexibility rules and satisfying the Commission's charge to advance the public interest.

In the *Pricing Flexibility Order*, the Commission recognized that, "although our current price cap regime gives LECs some pricing flexibility and considerable incentives to operate efficiently, significant regulatory constraints remain" and that "as the market becomes more

competitive, such constraints become counter-productive."¹⁶ Accordingly, the Commission established a framework for granting the local exchange carriers additional pricing flexibility, including removal of services from price cap regulation, upon certain competitive showings. As noted above, Verizon has satisfied those competitive showings in several pricing flexibility petitions, for which the Commission has granted Phase I or Phase II relief for special access and dedicated transport services offered in 73 MSAs and non-MSAs.¹⁷

Requiring Verizon to repeat those market-by-market showings for the Advanced Services at issue here in additional pricing flexibility petitions actually would injure marketplace competition by further saddling Verizon with an undue administrative burden. Under such a scenario, Verizon would have to repeat the process of gathering collocation data and re-proving satisfaction of the various pricing flexibility triggers.¹⁸ To achieve this, Verizon would have to, among other things, survey collocation in hundreds of offices, re-generate substantial amounts of revenue data, and serve all of its collocators with notice of this process. This process would constitute a significant burden on Verizon, as it tries to compete as a new entrant in a market segment that is dominated by other carriers. Indeed, a recent study confirms AT&T, MCI, and Sprint's dominance, noting that, collectively, the three IXC's hold 79% and 60% of the Frame Relay and ATM markets, respectively.¹⁹ In contrast, Verizon holds only 4.9% and 5.1% of those

¹⁶ *Pricing Flexibility Order*, ¶ 19.

¹⁷ See *Verizon Petitions for Pricing Flexibility for Special Access and Dedicated Transport Services*, *supra* fn 13.

¹⁸ See 47 C.F.R. 69.709 (2003) (establishing applicable pricing flexibility triggers).

¹⁹ M. Bowen, et al., Schwab Soundview Capital Markets, AT&T Corp. at 3 (Jan. 21, 2004). Because the Frame Relay marketplace is much larger than the ATM marketplace, these companies' share of the combined large business broadband services marketplace is approximately 75 percent. See R. Kaplan, IDC, *U.S. Frame Relay Services Forecast, 2002-2007*

same markets.²⁰ AT&T's Chairman trumpeted to Wall Street that his company is the nation's "largest private line/frame relay/ATM provider."²¹ Given the large market share of traditional IXCs, there is no reason for the Commission to be concerned that pricing flexibility for fast packet services would harm competition.²²

Under the circumstances here, requiring these broadband services to be incorporated into the price cap rules for traditional advanced services and then subjecting them to additional market-by-market showings, would defeat the very purpose of the pricing flexibility mechanism – removing regulatory constraints to spur competition.²³ Put differently, requiring new petitions would effectively mean imposing additional regulatory showings in order to satisfy a mechanism intended to minimize such showings. Even requiring a recalculation of pricing flexibility based on additional revenues with old data is unwarranted. There are likely to be numerous shifts in demand over time, but there is no corresponding obligation for new calculations to maintain pricing flexibility. The Commission should avoid such a counter-productive approach by recognizing that Verizon has already shown its Advanced Services merit pricing flexibility.

at Table 2 (Mar. 2003); R. Kaplan, IDC, *U.S. ATM Services Forecast, 2002-2007* at Table 2 (Mar. 2003).

²⁰ *Id.* at 2.

²¹ David Dorman, Chairman and CEO, AT&T, *Presentation for Credit Suisse First Boston Media and Telecom Week* at 5 (Dec. 11, 2003) ("Dorman Presentation").

²² See *Competition in the Provision of Voice Over IP and Other IP-Enabled Services, Report Prepared for and Submitted by BellSouth, Qwest, SBC, and Verizon, Appendix A: Broadband Competition: May 2004*, A-19, WC Docket No. 04-36 (May 28, 2004) ("BOC Broadband Report").

²³ *Pricing Flexibility Order*, ¶ 19.

Other local exchange carriers, such as BellSouth, already have pricing flexibility for these services, which are included in their special access tariffs.²⁴ SBC is able to exercise pricing flexibility for these services as well, because it maintains them in a separate affiliate pursuant to its merger order.²⁵ Verizon is in a unique position, however, because these services have been transferred back to Verizon from its affiliate (VADI) required by Verizon's merger order while the broadband proceedings still are pending. Although the services quite appropriately have been excluded temporarily from the price cap indexes in order to avoid subjecting them to the rules that apply to traditional services until the broadband proceedings are completed, they should be treated for pricing flexibility purposes no less than the services offered by the other price cap carriers. Indeed, if there were to be a difference, these services should be given *more* flexibility than traditional special access services given the especially competitive nature of these services.

Some IXCs dispute the competitive nature of the advanced services marketplace by arguing that they often rely on ILEC facilities to provide their Frame Relay and ATM services.²⁶

²⁴ See *BellSouth Petition for Pricing Flexibility*

²⁵ See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Memorandum Opinion and Order*, 17 FCC Rcd 27000, ¶1, 14 (Dec. 31, 2002) ("SBC Advanced Services Forbearance Order"); see also *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, ¶¶197-211, 444-476 (1999) ("SBC/Ameritech Merger Order")

²⁶ See *Verizon Telephone Companies Tariff* FCC Nos. 1 and 20, Transmittal No. 386, MCI Petition to Reject or, in the Alternative, Suspend and Investigate, 3-4 (filed Dec. 9, 2003) (citing *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Comments of WorldCom, Inc.*, CC Docket No. 01-337, fn 7 (filed March 1, 2002)). See also *Reply Comments of AT&T*, 92-94, CCB Dkt. Nos. 01-338, 96-98, 98-147 (filed July 17, 2004).

However, this claim is misleading in two respects. First, the IXC's already have their own ATM and Frame Relay switches and may connect their end users to those switches simply by purchasing access to Verizon's special access links that either are subject to price cap regulation or already have received pricing flexibility in areas with a significant amount of competitive alternatives.²⁷ As a result, and in either case, IXC's are capable of obtaining access at the reasonable rates necessary to compete effectively in the market for ATM and Frame Relay services, as definitively proven by their dominance in the retail marketplace for those services. Indeed, even as recently as this past December, AT&T's Chairman noted that AT&T's network "touches virtually all Fortune 1,000 companies."²⁸

Second, and more fundamentally, those special access links are not even the subject of this petition. This petition includes only packet switches and links that Verizon would use to provide its own Advanced Services. To the extent AT&T or other carriers use special access circuits to supplement their own facilities, Verizon already has received pricing flexibility for those services, and this petition does nothing to limit their access to those services. As a result, granting flexibility here is a smaller step than for the special access transport that has already been granted pricing flexibility.

²⁷ In addition, the Commission itself held in its *Triennial Review Order* that competitors are not impaired in their ability to provide packet switched services without access to unbundled packet switches given the explosion of competitive packet switching over the last six years. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶¶537-38 (2003) ("*Triennial Review Order*"). The Commission also noted that AT&T, MCI, and Sprint each operate their own extensive nationwide packet switching networks. *Id.* See also *BOC Broadband Report*, A-19.

²⁸ *Id.* at 5.

In addition to traditional IXC's, Verizon also faces increased competition for high-speed services in the large business market from alternative sources of broadband service, including cable modem, fixed wireless and satellite. Among these alternative sources, cable operators have been the most aggressive. Cox's Business division reports that it has already garnered 10 to 13 percent of the large business market (based on revenue) in areas where its services are currently available.²⁹ Comcast is leveraging fiber infrastructure to expand its development of fiber-to-the-building (FTTB) and passive optical networking (PON) services.³⁰ Similarly, Time Warner Cable is delivering high capacity access solutions to several Fortune 500 customers and Charter reports that 9 percent of its business subscribers are medium to large businesses.³¹

Without pricing flexibility, Verizon cannot offer the customized pricing and discounts and flexible contract terms that the IXC's and emerging market participants can offer. With such flexibility, Verizon can exert downward pressure on rates through individualized competitive offers.³² Verizon would be able to offer the same type of contract plans as its competitors. While this is only one step toward parity, it is an important one, because it gives Verizon the opportunity to compete and it gives customers the benefit of greater competition.

²⁹ See Cox Communications, Form 10-K (SEC filed Mar. 31, 2003).

³⁰ See Comcast Commercial Services, *Data Services*, http://www.comcast-ccs.com/frames.asp?section=products_and_services&page=data_description.

³¹ See Road Runner Business Class, *High Speed Internet*, <http://www.twcbroadband.com/products/hsd.php> (Jan. 13, 2004); Charter Communications, presentation before the UBS Media Week Conference, at 19 (Dec. 11, 2003) (reporting that 91% of business customers are small businesses).

³² See *ATU Telecommunications (Request for Waiver of Sections 69.106(b) and 69.124(b)(1) of the Commission's Rules, Order*, FCC 09-379, ¶17 (2000) ("ATU Waiver") (citing Expanded Interconnection with Local Telephone Company Facilities, *Report and Order and Notice of Proposed Rulemaking*, 7 FCC Rcd 7369, 7454 (1992)).

V. THE COMMISSION SHOULD GRANT A WAIVER TO PERMIT VERIZON TO EXERCISE THE SAME DEGREE OF PRICING FLEXIBILITY FOR BROADBAND SERVICES THAT IT ALREADY IS PERMITTED TO EXERCISE WITH RESPECT TO TRADITIONAL SPECIAL ACCESS SERVICES

Under the Commission's rules, a waiver may be granted "for good cause shown."³³ The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.³⁴ The waiver process provides "a safety valve procedure for consideration of an application for exemption based on special circumstances."³⁵ Verizon's *Petition for Waiver* satisfies this standard.

The unique circumstances surrounding the transfer of the former VADI services back to Verizon while the broadband proceedings are pending provide the "special circumstances" justifying a waiver of Section 69.729 and Paragraph 173 of the *Pricing Flexibility Order*. As noted above, the Bureau properly decided that it would not be in the public interest to subject the Advanced Services to the rules that apply to traditional narrowband services pending the outcome of the various broadband proceedings. The Bureau also did not find that the Advanced Services should be exempt from the pricing flexibility rules.³⁶ The waiver orders did not, however, address the impact of the waivers on Verizon's ability to exercise pricing flexibility with respect to these Advanced Services. The unintended consequence is that the Advanced Services remain in a state of regulatory limbo as the Commission considers the broadband proceedings, and ironically they are subject to greater regulatory constraints as a result of an

³³ 47 C.F.R. §1.3 (2003).

³⁴ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

³⁵ *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

³⁶ See *Verizon Petition for Interim Waiver of Sections 61.42(g), 61.38, and 61.49 of the Commission's Rules*, 17 FCC Rcd 11010, ¶1 (2002).

attempt to minimize regulatory burdens on these services. The level of competition in the relevant marketplace exhibited above provides sufficient evidence of "special circumstances" to warrant a waiver.³⁷

Moreover, granting the requested waiver unquestionably would serve the public interest. First and foremost, grant of a waiver would serve the public interest given the level of competition in the marketplace and such a grant's ability to foster additional competition.³⁸ As already shown, the marketplace for advanced services is highly competitive, with traditional IXCs actually dominating the marketplace and emerging broadband service providers increasingly taking business and enterprise market share. Yet, without pricing flexibility, Verizon is prevented from providing service and pricing offerings that are competitive with those of its competitors. This places Verizon in an inherently disadvantaged competitive position. By waiving these provisions, however, the Commission would enable Verizon to adopt the pricing flexibility it needs to compete effectively in the advanced services marketplace.

Second, a waiver would serve the public interest by minimizing administrative inefficiency and unnecessary regulatory burdens. It would serve no purpose, but would impose significant burdens, to subject these Advanced Services to price cap regulation and require additional market-by-market showings. The Commission does not need additional information, such as would be presented in entirely new pricing flexibility petitions on market-by-market basis, pursuant to Section 69.729. Attachment B provides the same information that Verizon would submit with an annual filing to satisfy the Paragraph 173 requirement. Also, these

³⁷ *ATU Waiver*, ¶¶14-16 (finding exhibited level of competition in Anchorage, AK exchange market sufficient to merit finding of special circumstances).

³⁸ *ATU Waiver*, ¶17 (finding grant of waiver to allow ILEC to offer term and volume discounts would serve the public interest by permitting petitioner to respond to competitive developments in the relevant market).

services would have been incorporated into pricing flexibility pursuant to the standards of Paragraph 173 if the Commission had not granted waivers to keep them out of the price cap indexes. Attachment B demonstrates that the Advanced Services are within the categories for which Verizon has been granted pricing flexibility in the qualifying MSAs. Consequently, the filing of a new pricing flexibility petition would be repetitive of the petitions that already have been granted. As already noted, this would impose additional regulatory burdens unnecessarily on Verizon that would undermine the intent of the Commission's pricing flexibility regime.

VI. ALTERNATIVELY, THE COMMISSION SHOULD GRANT FORBEARANCE TO THE EXTENT NECESSARY TO ALLOW VERIZON TO EXERCISE PRICING FLEXIBILITY FOR THE ADVANCED SERVICES AT ISSUE HERE

Under Section 10 of the Act, the Commission must forbear from applying a regulation to a telecommunications carrier or service if the Commission determines that: (1) such enforcement is unnecessary to ensure against unjust, unreasonable or discriminatory charges or practices; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest, including the promotion of competition.³⁹ This provision reflects the basic antitrust principle that the government should intervene in the marketplace only "for the 'protection of competition, not competitors.'"⁴⁰ The Commission has long identified that same principle with the 1996 Act more generally, establishing that consumers and not competitors

³⁹ 47 U.S.C. §10(a)-(b) (2003). These statutory inquiries are interrelated, each logically building on its predecessor. Reading the criteria in the order they were included in the statute by Congress shows that the analysis merely progresses from certain specific considerations that must be taken into account to more general considerations. As a result, facts satisfying one criterion naturally are relevant to satisfying one of the others.

⁴⁰ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))

should "be the ultimate beneficiary of the 1996 Act."⁴¹ Verizon's request for forbearance easily satisfies each of the three Section 10 requirements, as well as the underlying intent of the provision, because pricing flexibility would enhance competition in the advanced services marketplace and thereby benefit both consumers and the public interest, as well as render enforcement of price caps unnecessary.

A. Section 10(a)(1) - Just, Reasonable, and Nondiscriminatory Charges or Practices

Filings under Section 69.729 and Paragraph 173 are unnecessary to ensure that Verizon offers just, reasonable, and nondiscriminatory charges or practices for its Advanced Services because sufficient competition exists in the advanced services marketplace. The Commission itself has previously recognized in conducting the Section 10(a)(1) analysis that, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory."⁴² As already demonstrated above, the advanced services marketplace is extremely competitive, and Verizon is a minor player entering a market segment dominated by the major IXC's, cable companies and other emerging competitors also targeting this same market segment. This competition, coupled with the fact that Verizon does not exercise control over the components used to provide the services of its competitors (IXCs own their own switches and cable operators rely on their own

⁴¹ See Recommended Decision, *Federal-State Joint Board on Universal Service*, 16 FCC Rcd. 6153, 6195 (Dec. 22, 2000) ("Consumers are and should be the ultimate beneficiary of the 1996 Act"); First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 618 (1996) (local competition rules should be, as "Congress intended, *procompetition*" rather than "*pro-competitor*").

⁴² Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, Memorandum Opinion Order, 14 FCC Rcd 16252, ¶ 31 (1999) ("US West NDA Order").

architectures),⁴³ ensures that Verizon would be unable to impose unjust, unreasonable or discriminatory charges or practices should it be allowed to price its Advanced Services flexibly. Indeed, the relief requested here will ensure just and reasonable rates for consumers of the Advanced Services at issue by allowing Verizon to compete more effectively with other carriers who dominate this segment of the market.

Moreover, to the extent the other carriers that dominate the market segment seek to use special access services from Verizon as an input in providing advanced services, this petition does not affect the terms on which they obtain those services. On the contrary, the Commission already has granted pricing flexibility with respect to those services by granting Phase I and Phase II pricing flexibility for traditional special access services in the geographic areas at issue.⁴⁴ The Commission established in those pricing flexibility orders that a level of competition exists sufficient to ensure just and reasonable rates and to promote increased price competition.⁴⁵

B. Section 10(a)(2) – Protection of Consumers

In addressing the second criterion of the test, Verizon again notes the high degree of competition in the marketplace described above. As noted above, Verizon lacks the market power to engage in pricing or practices that will harm consumers of these services. Indeed, the customers who purchase the Advanced Services at issue here are primarily sophisticated larger

⁴³ *Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, as Amended, and Request for Relief to Provide International Directory Assistance Services, Memorandum Opinion and Order*, CC Docket No. 97-172, FCC 04-67 ¶ 20 (rel. Mar. 19, 2004) (“SBC IDA Order”) (noting that ILEC lack-of-control over elements used by competitors’ to provide service was relevant to finding of forbearance with respect to enforcement of international directory assistance regulations).

⁴⁴ See Verizon’s Petitions for Pricing Flexibility for Special Access and Dedicated Transport Services, *supra* fn 13.

⁴⁵ *Id.*

business customers who are well aware of competitive options and take full advantage of them. And, as shown, above, the major long distance carriers currently dominate this market segment, and the relief requested here will only benefit consumers of these services by allowing Verizon to compete more effectively and meet their needs.

In addition, the fact that the Commission has already granted pricing flexibility for traditional special access services in the geographic areas at issue again demonstrates that consumers will remain unharmed by forbearance. The Commission has found that its pricing flexibility rules ensure that a price cap LEC cannot "(1) . . . use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior; and (2) . . . increase rates to unreasonable levels for customers that lack competitive alternatives."⁴⁶ And, to the extent this is true for traditional special access services, it is all the more true for the Advanced Services at issue here.

C. Section 10(a)(3) – Serves the Public Interest

Finally, with respect to the third criterion, forbearance would be consistent with the public interest, because, again, it would promote competition within the advanced services marketplace.⁴⁷ Without pricing flexibility, Verizon cannot offer customized pricing or flexible contracts. Verizon also would continue to be subject to undue asymmetrical regulatory treatment. As a result, Verizon is hobbled in its ability to meet the demands of customers for

⁴⁶ *Verizon's Petitions for Pricing Flexibility for Special Access and Dedicated Transport Services*, 16 FCC Rcd 5876, ¶3 (Mar. 14, 2001) (citing *Pricing Flexibility Order*, 14 FCC Rcd at 14225).

⁴⁷ In many ways, this third criterion incorporates the prior two criteria and encompasses the general purpose of Section 10. Specifically, Section 10 is intended "to allow the FCC to reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest." 141 Cong. Rec. S7887 (daily ed. June 7, 1995) (statement of Sen. Pressler).

individualized solutions and to effectively compete against the IXCs and other emerging market participants.⁴⁸ Pricing flexibility would place Verizon on an equal footing with its competitors and give consumers the competitive pricing and additional choices of enhanced competition. Accordingly, the third and final criterion is satisfied.

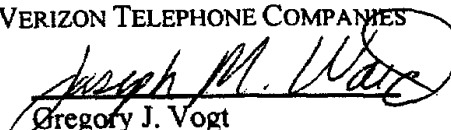
D. Conclusion

For the foregoing reasons, the Commission should grant Verizon's *Petition for Waiver* or, alternatively, *Verizon's Petition for Forbearance*.

Respectfully submitted,

THE VERIZON TELEPHONE COMPANIES

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Dated: June 25, 2004

⁴⁸ Id.; Pricing Flexibility Order, ¶ 19.

ATTACHMENT A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

ATTACHMENT B

Example of Annual Access Tariff Exhibit Demonstrating Eligibility for Pricing Flexibility

VERIZON - COSA

Fast Packet Services Introduced in Calendar Year 2003 and through mid calendar year 2004

Tariff Section	Basket / Service Description	Service Category
	COMMON LINE BASKET	
	None filed	
	TRAFFIC SENSITIVE BASKET	
	None filed	
	TRUNKING BASKET	
	None filed	
	SPECIAL ACCESS BASKET	
FCC No. 20, Part I, 5.1	Frame Relay Service (North)	HC/DDS
FCC No. 20, Part I, 5.8	Exchange Access FRS (South)	HC/DDS
FCC No. 20, Part II, 5.9	Frame Relay III (West)	HC/DDS
FCC No. 20, Part I, 5.10	ATM Cell Relay Service (East)	HC/DDS
FCC No. 20, Part II, 5.10	Asynchronous Transfer Mode Cell Relay Service (West)	HC/DDS
FCC No. 20, Part I, 5.12	Internet Protocol - Virtual Private Network (IP-VPN) (East)	HC/DDS
FCC No. 20, Part II, 5.12	Internet Protocol - Virtual Private Network (IP-VPN) (West)	HC/DDS
FCC No. 20, Part I, 5.3	National Transparent LAN Service (East)	HC/DDS
FCC No. 20, Part II, 5.11	National Transparent LAN Service (West)	HC/DDS